

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

*Orig. Affidavit of
Filing*

77-1458

To be argued by
GAVIN W. SCOTT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1458

UNITED STATES OF AMERICA,

Appellee,

—against—

MICHAEL PAPPADIO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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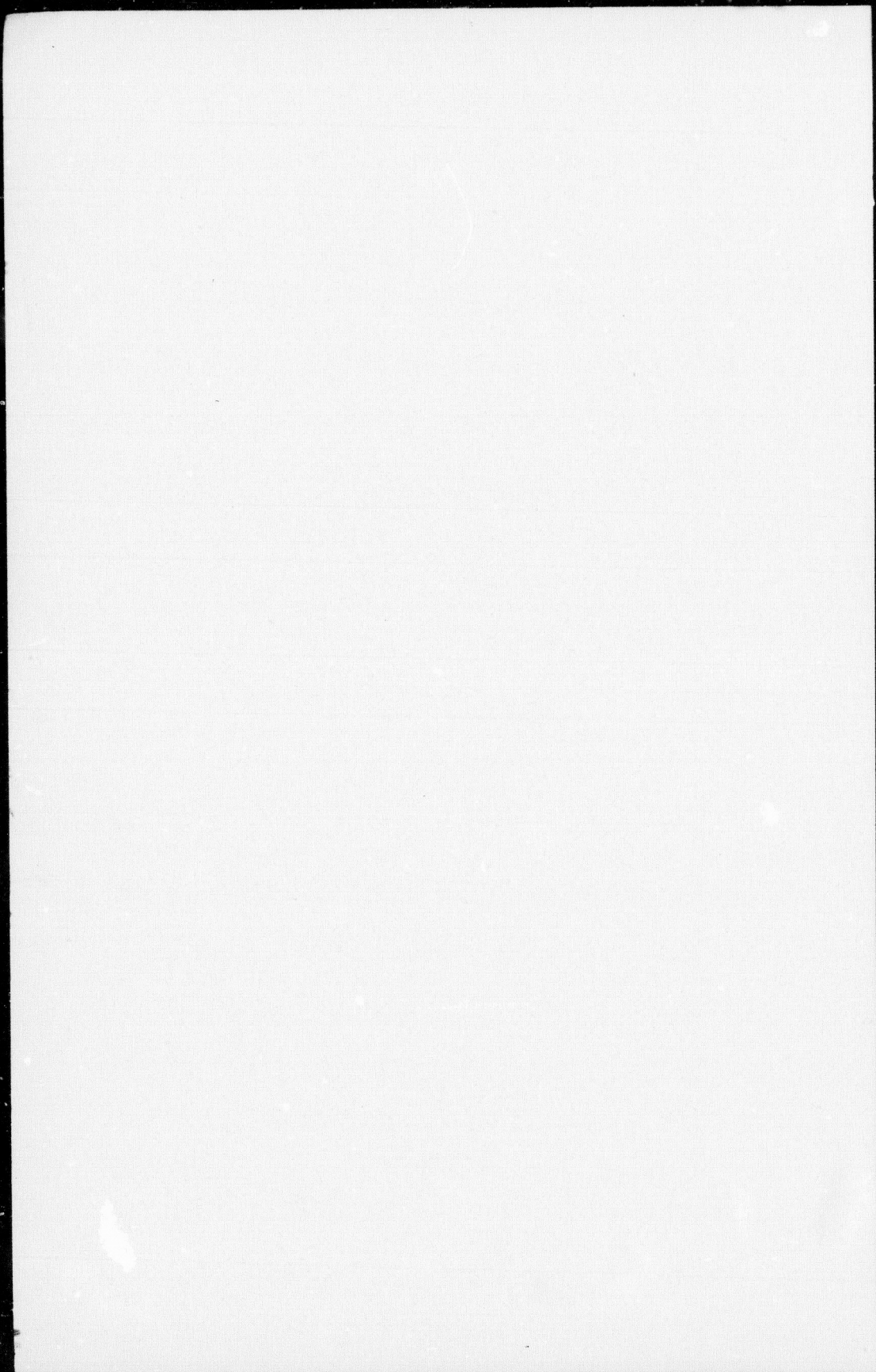


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Docket No. 77-1458

UNITED STATES OF AMERICA,

Appellee,

—against—

MICHAEL PAPPADIO,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant Michael Pappadio appeals from a judgment of the United States District Court for the Eastern District of New York (Edward R. Neaher, *J.*) convicting him, after a jury trial, of violations of the federal tax laws and conspiracy. Appellant, together with Matteo DeLorenzo and Alphonse Esposito, was charged in 21 counts of a 22 count indictment with: (1) separate conspiracies with each DeLorenzo and Esposito to defraud the United States in the collection of revenue and to evade taxes and file false tax returns in violation of 18 U.S.C. § 371 (Counts 1 and 2); (2) corporate tax evasion in violation of 26 U.S.C. § 7201 (Counts 3 and 4); (3) filing false Employer's Quarterly Federal Tax Returns (Form 941) in violation of 26 U.S.C. § 7206(1) (Counts 5 through 13); (4) failure to file corporate tax returns in violation

of 26 U.S.C. § 7203 (Counts 14 and 15); and (5) aiding and abetting DeLorenzo and Esposito in the filing of false Individual Income Tax Returns in violation of 26 U.S.C. § 7206(1) (Counts 16 through 21).¹

Michael Pappadio was sentenced under 18 U.S.C. § 3651 to concurrent terms of two years' imprisonment (of which he is to serve six months in prison), three years on probation, consecutive fines of two thousand dollars (\$2,000), and the cost of prosecution upon his conviction of Counts 1, 3, 4, 5, 6, 7, 10, 12, 17, 18 and 19.² Pappadio is currently free on bail pending appeal.

On appeal, Pappadio claims that: (a) portions of the prosecutor's summation misstated facts in evidence; (b) the court below erred by finding that a knowing and willful listing of a fictitious employee on an Employer's Quarterly Federal Tax Return (Form 941) would constitute a material misrepresentation under 26 U.S.C. § 7206(1); (c) the trial court erred by not granting a severance of the two conspiracies charged; (d) the Government failed to prove venue as to Counts 3 and 4; and (e) there was insufficient evidence to sustain the conviction. Pappadio maintains that these alleged defects and errors below warrant reversal of his conviction and a remand for a new trial.

¹ Prior to trial, the Government consented to a severance of Counts 14, 15 and 22. During the trial, Count 16 was dismissed on DeLorenzo's motion as being barred by the statute of limitations. After the Government rested, Judge Neaher, pursuant to Rule 29, F.R. Crim. P., granted a motion by Esposito to dismiss the counts in which he was named which had not been severed (Counts 2, 4, 8, 9, 11, 13, 20 and 21). With the exception of Count 4, which also named DeLorenzo, the counts dismissed as to Esposito were also dismissed as to Pappadio.

² The defendant DeLorenzo was also convicted on these counts. He received concurrent sentences of two years imprisonment on each count, execution of which was suspended. DeLorenzo has not appealed his conviction.

Statement of Facts

Introduction

The indictment in this case was filed with the Clerk, United States District Court, Southern District of New York, on April 22, 1975. Pursuant to a timely defense motion under 18 U.S.C. § 3237(b), the Honorable William C. Conner, United States District Judge, Southern District of New York, ordered a change of venue to the Eastern District of New York on June 2, 1975. A certified copy of this order of transfer was received by the Clerk, United States District Court, Eastern District of New York, on June 9, 1975, and the case was assigned to the Honorable Edward R. Neaher, United States District Judge.

The indictment, as noted above, alleged two mirror image conspiracies charging appellant Michael Pappadio and Matteo DeLorenzo in Count 1, and Pappadio and Alphonse Esposito in Count 2, with conspiring to defraud the United States by impeding, impairing, obstructing, and defeating the Internal Revenue Service in the ascertainment, computation, assessment, and collection of revenue, and with substantive violations of the internal revenue laws. Specifically, the indictment charged that Pappadio, as chief officer and shareholder of M. B. H. Sales, Inc., and of Bidio Management, Corp., caused the names of DeLorenzo and Esposito to be placed on the payroll records of these corporations³—even though the men performed no services for the companies—and that the corporations thereby substantially and wrongfully reduced their federal tax liabilities.

³ DeLorenzo appeared on the books of MBH Sales, Inc., and Bidio Management, Corp. as an employee. Esposito appeared as an employee only on the books of Bidio Management Corporation.

The evidence presented at trial in support of the charges came from witnesses who were either business associates, employees, or relatives of appellant. The evidence established: (1) that neither DeLorenzo nor Esposito performed any services for the corporations in question and therefore, that the corporations were not entitled to deduct as business expenses salaries purportedly paid to these men; (2) that Pappadio's inclusion of DeLorenzo's and Esposito's names on the Employer's Quarterly Federal Tax Returns of the respective corporations constituted a materially false statement; and (3) that, by utilizing W-2 forms supplied by the respective corporations, DeLorenzo and Esposito reported a false source of income on their respective personal income tax returns (Forms 1040).

The Government's case

Michael Pappadio and Irwin Bishins were fifty percent partners in M.B.H. Sales Inc., (hereinafter referred to as MBH) and Bidio Management Corp., (hereinafter referred to as Bidio), two garment center firms located at 325 West 37th Street, New York, New York, which cut material for dress manufacturers (T. 358-60).⁴ According to Bishins, the two men met in the mid-1950's when Bishins was a dress manufacturer and Pappadio was the manager of the Pennsylvania Contractors' Association (T. 356). In the early 1960's, Bishins, Pappadio, and a third individual, who subsequently left the business, formed MBH, a dress cutting shop. Bishins was in charge of production and Pappadio and the third partner were responsible for soliciting sales—i.e., for contacting manufacturers to ascertain if they needed cutting work

⁴ Numbers in parentheses preceded by "T" refer to pages of the trial transcript.

performed. Around the turn of the decade (1969-1970), MBH phased out of operation and Bidio, in essence, took over, employing the same employees. The responsibilities of Bishins and Pappadio remained the same (T. 357-360). However, since Bishins was only involved in the pricing of cutting material, Pappadio was basically in control of MBH and Bidio and ran the day to day operations of the business (T. 365).

In addition to owning MBH and Bidio, appellant and Bishins owned many dress manufacturing companies, a number of which used MBH and Bidio for cutting work (T. 360-363). With respect to these manufacturing companies, there was no need for a salesman to solicit them on behalf of MBH and Bidio (T. 363). For the years in question (1968-1971), thirteen of the thirty-five dress manufacturers which dealt with MBH and Bidio were owned by appellant and/or Bishins (T. 361-63, Gov't. Exhibits 7, 8, 9 and 27).

Bishins testified that he had seen DeLorenzo at MBH and Bidio, and Esposito at Bidio, at various times when each was in conversation with appellant. Bishins had also seen DeLorenzo and Esposito with Pappadio at another manufacturing company they jointly owned. However, Bishins stated he did not know that DeLorenzo was listed as an employee on the books of MBH and Bidio or that Esposito was so listed on the books of Bidio. Nor did Bishins know that DeLorenzo and Esposito were being paid salaries as salesmen. Although Bishins never reviewed the books and records of the corporations and trusted Pappadio to run the business, Pappadio never told him that in 1968 and 1969 DeLorenzo was employed by MBH and that in 1970 and 1971 both DeLorenzo and Esposito were employed by Bidio (T. 363-367). In fact, the first time Bishins learned that DeLorenzo was reflected on the books of MBH and Bidio was in March of 1973, when he was examined in a federal grand jury

on two occasions. After these appearances, Bishins testified he asked appellant about DeLorenzo and appellant replied, "Look, you handle your production and I'll worry about Bidio and MBH" (T. 378, 442-443). Appellant did not tell Bishins that DeLorenzo was a salesman (T. 444).

The testimony of the bookkeeper for MBH and Bidio, Helen Miller, established that in 1966 appellant caused the name of Matteo DeLorenzo to be entered on the payroll records of MBH (T. 89-90, 97). From these payroll records, Mrs. Miller prepared the Employers Quarterly Federal Tax Returns (Form 941) (T. 98-99). The 941 Forms were customarily reviewed by the corporate accountant and then signed by appellant and mailed to the Internal Revenue Service. Mrs. Miller acknowledged that all the 941 returns (Gov't. Exhibit 11) referred to in Counts 5 through 13 of the indictment were signed by Pappadio (T. 99-105). Similarly, the W-2 Forms of MBH for the years 1968 and 1969 in the name of Matteo DeLorenzo, and of Bidio for the years 1970 and 1971 in the names of Matteo DeLorenzo and Alphonse Esposito (Gov't. Exhibits 12 and 13), were prepared by Mrs. Miller from the payroll records of the respective corporations (T. 106-09). The bookkeeper further explained that she was instructed by Pappadio how much money to pay employees and occasionally by the cutting room foreman Nat Sacco how much to pay cutters (T. 109-10).

The payroll records were also utilized as the basis upon which payroll checks were drawn. In the case of payroll checks drawn on MBH and Bidio in the name of DeLorenzo, Mrs. Miller always gave them to Pappadio, never to DeLorenzo (T. 110-12). On certain occasions, Pappadio would return the DeLorenzo checks to Mrs. Miller with the name of the payee already endorsed and asked her to cash them. Mrs. Miller would comply and would always give the cash to Pappadio, never to DeLorenzo (T. 112-14). Mrs. Miller testified to identical

facts regarding Alphonse Esposito (T. 114-18). However, on cross-examination, Mrs. Miller testified that without seeing her second endorsement on the backs of the Esposito payroll checks, she had no independent recollection of cashing some of those checks and giving the proceeds to Pappadio (T. 173-75). With respect to the DeLorenzo checks, Mrs. Miller was able to identify the checks she cashed by the appearance of her second endorsements (T. 142-45, Gov't. Exhibits 14, 15 and 16).

Mrs. Miller stated that although she had seen DeLorenzo at the office of MBH and Bidio speaking with appellant, DeLorenzo never asked her for his pay checks and she never gave them or the cash proceeds to him (T. 148). Nor did she know what services, if any, DeLorenzo or Esposito performed for the companies (T. 149).

Nat Sacco, the foreman of MBH and Bidio and brother-in-law of appellant, was another who, although introduced to DeLorenzo by appellant as a salesman, did not know what services DeLorenzo performed for the companies and never received any orders or instructions from DeLorenzo (T. 484-49, 495, 497, 504-05).

Representatives of all the dress manufacturer customers of MBH and Bidio who could be located testified, or their prospective testimony was stipulated, regarding their firms' business dealings with MBH and/or Bidio and the persons at MBH and Bidio whom they dealt with for the years in question (1968-1972).⁵ All of these witnesses testified that they had never heard of or done

⁵ The testimony of these witnesses or the stipulations commence at the following transcript pages: Stanley Yellin—449, Richard Kirshy—462, Harry Jacknow—513, Robert Efron—537, Carl Schlossberg—550, Arnold Passeroff—573, Lawrence Korman—637, Jerome Langer—678, Harry Stettner—767, Gerald Bauxbaum—769, and Gerald Cohen—769.

business with Matteo DeLorenzo or Alphonse Esposito (where applicable, since he was only listed as an employee of Bidio).⁶

Aside from the above noted customers of MBH and/or Bidio, two other witnesses, who also were partners of Pappadio's in business, had never heard of or dealt with DeLorenzo or Esposito. Richard Kirshy met appellant in the late 1950's and became a 50 per cent partner of his in 1960 in a firm called Patricia Manufacturing. Kirshy described Pappadio as the salesman of the firm and stated that in dealing with MBH and Bidio, he had never heard of DeLorenzo or Esposito (T. 462-65).

⁶ Some of these witnesses stated they only dealt with appellant and/or Nat Sacco, the cutting foreman. See the testimony of: Harry Jacknow (T. 517); Arnold Passeroff (T. 574-75); Stanley Yellin (T. 451-52, 458); Jerome Langer (T. 678-81); Harry Stettner (Stipulation) (T. 767-68); Lawrence Korman (T. 660-2); Gerald Bauxbaum (Stipulation) (T. 769). According to the W-2 Forms attached to Pappadio's personal income tax returns, Pappadio was an employee of Bauxbaum's firm, Judy Bee, and was paid: \$14,300 in 1969; \$10,775 in 1970, and \$9,000 in 1971, as salary. One witness, Gerald Cohen, whose testimony was stipulated, did not know anyone at MBH or Bidio except Irwin Bishins, whom Cohen had met through his father-in-law (T. 769). Another witness, Robert Efron, only remembered dealing with MBH, but couldn't remember anyone connected with the firm. Efron did testify, however, that no one from MBH had ever solicited business from him, and, as noted above, that he had never heard of or dealt with Matteo DeLorenzo (T. 541-42, 548-49).

Several manufacturers had known Pappadio for many years after meeting him in the industry. See the testimony of: Carl Schlossberg (T. 552-53); Lawrence Korman (T. 647-48); Arnold Passeroff (T. 574-77, 581); and Stanley Yellin (T. 450-51). Also, according to Pappadio's personal income tax return, he was an employee of Yellin's firm, Kim Walker, in 1969 and was paid \$6,300 as salary.

The other partner of Pappadio, Richard Daro, went into business with appellant in 1966 in a cutting shop located in the same building as MBH and Bidio. Again, appellant was responsible for soliciting the work for this firm, Daro Sales, which went out of business in June of 1972. During its existence, Daro Sales performed cutting services for Bidio. Richard Daro testified that he had never heard of or dealt with DeLorenzo or Esposito, but that while testifying in a federal grand jury in March, 1975, he learned for the first time that in 1972 Esposito was listed on the Daro payroll as an employee and had been paid \$3,600 (T. 585-88, 596-98).

The Government also called a handwriting expert to testify concerning the endorsements on the DeLorenzo payroll checks. Rather than have him testify, the following facts were stipulated (Gov't. Exhibit 24) : For the year 1969, none of the MBH payroll checks made payable to Matteo DeLorenzo were endorsed by DeLorenzo. The only MBH check endorsed by DeLorenzo in 1969 was dated April 9th in the amount of \$12,000 (Gov't. Exhibit 16). During 1970, DeLorenzo did not endorse any of the Bidio payroll checks made payable to him. He did endorse two checks in 1970, one dated April 6th in the amount of \$8,000 and the other dated June 17th in the amount of \$2,000 (Gov't. Exhibit 14). In 1971, 21 out of 41 Bidio payroll checks were endorsed by DeLorenzo. Also, two other checks were endorsed by DeLorenzo; one dated April 2nd in the amount of \$6,000 and the other dated June 30th in the amount of \$33.80 (Gov't. Exhibit 15). Of course, as the checks themselves reveal, an endorsement in the name of Matteo DeLorenzo appears on all but a few of the MBH and Bidio checks. However, DeLorenzo himself only endorsed 21 out of 152 of these checks.

More evidence concerning these DeLorenzo checks was provided by Mario Suriano, a nephew by marriage of appellant. Suriano testified that in 1969 he received a

\$25,000 loan from Pappadio with which to build a home. This loan was provided in the form of cash money and checks made payable to other persons, which Suriano endorsed and deposited in his bank account. Included in the checks given to Suriano by Pappadio were seven MBH payroll checks made out to Matteo DeLorenzo, dated from May to September of 1969.⁷ Although Suriano could not be sure if all the other corporate checks he received reflected Pappadio as the maker, he did remember that Josie Fanelli was the payee on some because he knew Josie Fanelli through the family. Josie Fanelli is also listed as an employee on certain 941 Forms of MBH and Bidio (Gov't. Exhibit 11). Suriano further recalled that the names of two of the corporations on whose accounts some of the checks he received from Pappadio were drawn were Patricia Fashions and Mar-Jo.⁸

Fred Warner also saw and endorsed two DeLorenzo payroll checks in 1969. Warner testified that in 1969 he worked for Michael Pappadio at the House of She, but did not know Matteo DeLorenzo. He also could not explain how his endorsements, which he identified, appeared on two MBH payroll checks made payable to DeLorenzo (T. 669-72).

⁷ None of the endorsements on these checks were made by DeLorenzo. See Gov't. Exhibit 16, check nos. 1740, 179, 207, 128, 1897, 1656, and 154. Needless-to-say, Suriano did not know DeLorenzo (T. 693).

On direct examination Suriano stated he recalled receiving some checks from Pappadio which were made payable to Esposito. On cross-examination Suriano mistakenly stated that he based his recollection on the fact that the Government had shown him such Esposito checks. This error was corrected by the prosecutor (T. 693, 700-04).

⁸ Irwin Bishins testified that these firms were owned by Pappadio (T. 362-63). Richard Kirshy also testified that he and Pappadio owned Patricia Manufacturing (T. 463). See also Gov't Exhibit 27.

The Government called two technical witnesses regarding the tax returns involved. Myron Raisman, an attorney and certified public accountant, testified he had known appellant for fifteen years and had prepared both Pappadio's personal and business income tax returns, including those of MBH and Bidio (T. 229-30). Raisman explained that the day-to-day bookkeeping at MBH and Bidio was performed by Helen Miller and that he habitually checked her work for accuracy. With regard to the 941 Forms, Raisman would check the amounts listed against the payroll book and cash disbursements book at the offices of MBH and Bidio (T. 230-36). He further identified the corporate tax return of MBH for the fiscal year ending October 31, 1969 as having been completed and signed by himself (T. 236, Gov't. Exhibit 19). Raisman stated that the corporate tax return of Bidio for the fiscal year ending August 31, 1970 was prepared by members of his firm and then signed by him as preparer (T. 237-38, Gov't. Exhibit 20).

Raisman noted that the computation of the corporate tax returns in question was based on the books and records of the firm, discussions with appellant, and occasional conversations with Helen Miller (T. 238-39, 269, 353). He further indicated that the basic information for the returns was obtained from the books and records of MBH and Bidio at 325 West 37th Street in Manhattan, but that the finalized returns were prepared at his office, which is located in Smithtown, Long Island (T. 267-68, 247-48, Gov't. Exhibits 19 and 20). After the corporate tax returns of MBH and Bidio were completed, they were mailed to Pappadio with instructions for filing (T. 248). With regard to the MBH 1969 return and the Bidio 1970 return, Raisman confirmed that part of the business deductions taken were expenses for salary as reflected by the W-2 Forms, which effectively reduced the corporate income taxes of the respective firms (T. 239-44).

On cross-examination by Esposito's trial counsel, Raisman agreed that a corporation in a fifty percent tax bracket would have to spend \$10,000 in salary in order to save \$5,000 in taxes via salary deductions. Such a situation was characterized as a losing proposition (T. 272-74). Counsel for Pappadio then engaged in the following questioning of Raisman:

Q. Could the corporation and could Mr. Pappadio have benefited the slightest bit by putting two people on the payroll for those two years in terms of increasing the assets?

A. No.

Q. Now, you're also a lawyer as well as a CPA, is that correct?

A. That's correct. (T. 304).

On redirect examination Raisman was asked the circumstances under which Pappadio might or might not benefit, assuming that Pappadio received the net proceeds of payroll checks purportedly paid to someone else. The answer depended upon the respective tax brackets of appellant and the other individual, according to Raisman. A comparison by Raisman of Pappadio's personal income tax returns (Gov't. Exhibit 21) with those of DeLorenzo (Gov't. Exhibits 3, 4, 5 and 6) for the years 1968 through 1971 revealed that Pappadio was in the higher tax brackets (T. 332-36, 338, 344-45). The implication was that Pappadio would have benefited if he had received the net proceeds of the DeLorenzo payroll checks.

This theme was explored further by the prosecutor with Sidney Buchbinder, the technical advisor to the Regional Counsel of the Internal Revenue Service (T. 770). Buchbinder agreed with Raisman that the only way an employer could benefit from keeping the net proceeds of payroll checks purportedly paid to an employee, if the

employee reported the income as his and paid taxes upon it, would be if the employer were in a higher tax bracket than the employee (T. 796-801). Buchbinder then testified that if Pappadio had received the net proceeds of the salary purportedly paid to DeLorenzo by MBH and Bidio, the following tax deficiencies would arise as to Pappadio:

<i>Net Proceeds Added to</i>		
<i>Year</i>	<i>Pappadio's Reported Income</i>	<i>Deficiency</i>
1968	\$27,492	\$16,114
1969	\$21,503	\$17,575
1970	\$26,040	\$17,290
1971	\$23,393.50	\$12,794
Totals	\$98,427.50	\$63,773

(T. 807-09, 863-869).

Of course, Buchbinder initially testified that if MBH and Bidio were not entitled to deduct business expenses for salaries paid to DeLorenzo and Esposito the result would be an increase in the corporate income tax of MBH and Bidio. If such salary deductions were discounted and the amounts added back to the taxable income for the fiscal year ending October 31, 1969, MBH should have reported a tax of \$8,814.34 as opposed to the zero amount it did report, and Bidio, for the fiscal year ending August 31, 1970, should have reported a tax of \$5,015.25 as opposed to the \$23.36 it did report (T. 774-77).

Motions at the close of the Government's case

After the Government rested, counsel for Esposito moved for a judgment of acquittal pursuant to Rule 29, Federal Rules of Criminal Procedure. The argument was extended, covering some 65 pages of transcript (T. 983-1048). During the course of the argument, comparisons were often made by counsel for Esposito and

by the prosecutor between the evidence as it related to DeLorenzo and Pappadio vis-a-vis Esposito and Pappadio. The trial judge also made numerous comparative remarks all indicating his view that the evidence against DeLorenzo and Pappadio was sufficient, whereas the sufficiency of the evidence against Esposito was questionable (T. 1006, 1009, 1016, 1018-19, 1027, 1046). Judge Neaher granted Esposito's Rule 29 Motion and denied similar motions made in behalf of DeLorenzo and Pappadio (T. 1123, 1133).

Trial counsel for Pappadio also moved to dismiss Counts 3 and 4 "... because they don't charge venue, no jurisdiction to try this case" (T. 1114). Judge Neaher then commented that the defendants had previously moved to have the case transferred to the Eastern District of New York. Mr. Kossman, counsel for Pappadio, responded that the case "... was no good in New York" (T. 1114). Mr. Kossman, joined by Mr. Markowitz, counsel for DeLorenzo, argued that the indictment charged the "crime was committed in Andover, Massachusetts" and that there was no averment in these counts that anything was done in the Southern District of New York. According to defense counsel, the Government was saying in its indictment "... this is a Massachusetts case" (T. 1115). Mr. Kossman then claimed that he could not have made the motion beforehand. The prosecutor responded that a venue defect obvious on its face is waived if not raised prior to the commencement of trial (T. 1115-16). Mr. Kossman then, in essence, equated such an obvious defect with a failure of the indictment to state an offense, a defect he could properly raise at that time. Judge Neaher denied the motion.

Pappadio and DeLorenzo both rested without presenting a defense case.

ARGUMENT

POINT I

Those portions of the prosecutor's summation now complained of were not improper and do not entitle appellant to a new trial.

Pappadio attributes error to three portions of the prosecutor's summation, claiming that misstatements of fact were so prejudicial as to require a reversal of his conviction. As will be demonstrated below, these assertions are frivolous and should be summarily rejected.

At the outset, the Government submits that the instant claim is not properly available to Pappadio on appeal. No objections were made below to any of the prosecutor's remarks now cited for review, nor does appellant rely on any stated plain error doctrine which would properly bring this issue before the Court under Rule 52(b) of the Federal Rules of Criminal Procedure. Therefore, in the absence of any objections below, which would have prompted either clarification by the prosecutor and/or curative instructions by the trial judge to dispel any arguably unfair inferences by the jury, and in the absence of any present claim of plain error, it is clear that this issue has been waived and is not available on appeal. *United States v. Nemes*, 555 F.2d 51 (2d Cir. 1977); *United States v. Ong*, 541 F.2d 331 (2d Cir. 1976); *United States v. Canniff*, 521 F.2d 565, 572 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976); *United States v. Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970). See also Rule 12(f), Federal Rules of Criminal Procedure.

However, for purposes of this argument, the Government will assume that Pappadio is indeed raising a claim of plain error in the summation and will respond on

that basis, despite the obvious inference that the failure of two experienced trial counsel to object below indicates their difficulty in finding the prejudice now asserted. Further, it should be emphasized that as to each instance of claimed error, counsel has grossly misinterpreted the record and has quoted portions thereof out of context to such an egregious extent that a thorough explanation is required to unravel the fabrications asserted.

Pappadio initially alleges that "despite prior warnings", the prosecutor, in "total disregard [of] the Court's prior admonition", argued to the jury that none of the customers of MBH or Bidio had ever heard of or dealt with Matteo DeLorenzo.⁹ (See Appellant's Brief, pp. 9 and 12). The record conclusively establishes that no such admonition was given nor intended. In fact, the statement of the court characterized by appellant as an "admonition," came during argument on co-defendant Esposito's Rule 29 motion, some 160 pages before the prosecutor's first mention to the jury that none of the customers of MBH or Bidio, for which DeLorenzo was supposed to be a salesman, had ever heard of DeLorenzo (T. 1042 and 1202).

During the above-mentioned Rule 29 argument (T. 983-1048), the prosecutor made the argument in question eight times regarding Esposito.¹⁰ The single exchange utilized by appellant occurred after the court had again expressed its concern over the weakness of the case against Esposito and, in that light, the highly questionable (in the court's view) value of the testimony of the

⁹ Appellant cites two instances where this argument was made at pages 1202 and 1296. The record indicates the argument was also made at pages 1214-15 and 1222 and that upon each occasion, no objection was made.

¹⁰ See the record at pages: 1002, 1003, 1015, 1031, 1032, 1034, 1041, and 1046-47.

customer witnesses as it related to Esposito. The following colloquy took place:

The Court: What I find here is that these people [the customers] really either left things to other people in their organization to do or they had no direct contact with salesmen at all because they had already lined up their business with Pappadio and there was no need to see salesmen.

Mr. Scotti: But nobody in the business——

The Court: You can't say nobody.

Mr. Scotti: Bishins didn't know him, Sacco didn't know him, Helen Miller didn't know what he did——

The Court: When you say Sacco didn't know him——

Mr. Scotti: Sacco had no idea what he did.

Mr. Goldberg [Counsel for Esposito]: Sacco said he was introduced to him as a salesman.

Mr. Scotti: Never employed but introduced as a salesman.

The Court: Sacco wasn't asked about what he did because it wasn't his function——

Mr. Scotti: I asked Sacco if he ever got instructions from Mr. Esposito and he said no.

The Court: That doesn't mean he should have.

Mr. Scotti: I guess this is what we are at loggerheads on. (T. 1042-43).

Taken in fair context, it is apparent that when the prosecutor referred to "nobody in the business", he was referring to Bidio and not to the customers, and was trying to establish that not even the people in the company for which Esposito purportedly acted as a salesman

knew him or what he did. The responses of the prosecutor, the court, and Mr. Goldberg make this clear. Therefore, it is apparent that the court's statement did not relate to the customers' testimony at all, but rather, to the testimony of the employees and owners of Bidio. Conclusive evidence of this fact is found just four pages after the above-quoted exchange, where the following took place:

Mr. Scotti: This man [Esposito] was paid 9,000 and 18,000 dollars in two calendar years and not one person dealing with this company [Bidio] ever heard of him.

The Court: In the absence of anything else, one could say it was fishy—(T. 1046-47).

Suffice it to say that appellant has completely misinterpreted the record. The trial judge did not admonish the prosecutor to refrain from referring to the testimony of the customer witnesses in summation, for in doing so, the prosecutor was merely making proper argument based upon evidence duly admitted during the trial.

The next allegation of prejudice is that the prosecutor misrepresented that the total amount of a twenty-five thousand dollar (\$25,000) loan from Pappadio to his nephew was in the form of payroll checks made out in the name of Matteo DeLorenzo when, in fact, only nine hundred dollars (\$900) worth of DeLorenzo checks were used by Pappadio. In this connection, Pappadio also maintains that the prosecutor, "[b]ased on this 'proof' of a minimal number of DeLorenzo checks being used by Pappadio", prejudicially argued "that DeLorenzo never received the proceeds of these checks." (Appellant's Brief, p. 13).

The most economical and conclusive method of demonstrating the erroneousess of this claim is to refer this Court to the prosecutor's summation in its entirety and

more specifically, to pages 1219-22 thereof. A fair reading of these transcript pages shows that the prosecutor did not argue that the loan in question consisted exclusively of DeLorenzo payroll checks and that the prosecutor cited evidence in the record in support of his argument that the proceeds of the DeLorenzo payroll checks went to Pappadio.

Finally, appellant claims that the prosecutor argued to the jury that Pappadio was guilty of personal income tax evasion, a crime with which he was not charged, and implied that the Government was "being lenient toward Pappadio by only indicting him for some of the 'crimes' he allegedly had committed . . ." (Appellant's Brief, p. 14). Again appellant misstates the record, for such an argument was never made, either overtly or impliedly, during the prosecutor's closing remarks.

In fact, it was appellant's trial counsel who argued during summation that Pappadio might be guilty of personal income tax evasion:

Mr. Kossman: I beg your pardon. W-2's. You will find—remarkable. Oh, yes. Oh, yes. Why didn't they indict Mr. Pappadio on this, his personal income tax? They say he got \$90,000, \$80,000, \$50,000, \$30,000, \$20,000. They would have indicted him on \$500 if they thought that he really got the money.

Again, I submit the failure to bring a personal indictment against him is the greatest proof in the world that he didn't get the money. It's what they didn't do that is most eloquent. (T. 1255-56).

In response to this argument, the prosecutor stated:

Mr. Kossman says oh, but the Government didn't indict Mr. Pappadio for personal tax evasion. Therefore, I assume from Mr. Kossman's

argument that this case means nothing because we didn't indict Mr. Pappadio for personal tax evasion. I don't know if he means that if we did indict him for personal tax evasion he'd automatically be guilty. I don't think he means that. I'm sure he doesn't mean that.

Mr. Pappadio wasn't indicted for personal income tax evasion. We should have but we didn't. I submit you shouldn't consider that whether or not he was or wasn't indicted for some other charge has anything to do with this case because it doesn't.

As you will recall, this evidence was presented on the issue of motive—to show you what possible motive Mr. Pappadio would have. (T. 1288-89).

It is submitted that there are no improper implications in the above-cited argument. Rather, the prosecutor was engaging in "fair rejoinder to defense counsel's argument in summation. . . ." *United States v. Lipton*, 467 F.2d 1161, 1168-69 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973).

It must be noted briefly that Pappadio's personal income tax returns were put into evidence only after his trial counsel, through cross-examination, raised the issue of motive to falsify (T. 304). The prosecutor then himself sought to show a motive (T. 320-347). Moreover, under Rule 404(b), Federal Rules of Evidence, such evidence of motive would have been proper even absent counsel's opening the door to such inquiry. Therefore, it is not surprising that Pappadio does not claim the prosecutor argued from facts not in evidence.

In any event, it is clear that the prosecutor acted in a fair and proper manner in arguing that the jury should not consider whether Pappadio was indicted for other

charges and in reminding the jury that the evidence in question was presented for the limited purpose of showing a possible motive (T. 1289; see also 1225). Indeed, it is respectfully submitted that appellant's entire first point is totally devoid of merit; his argument is a fabrication calculated to obfuscate the facts and should, accordingly, be rejected.

POINT II

The trial court properly found that if DeLorenzo's name was falsely listed on the employer's quarterly federal tax returns, such a false listing would constitute a material misrepresentation.

Pappadio next asserts that the false listing of a person as an employee on the Employer's Quarterly Federal Tax Return (Form 941) does not constitute a material misrepresentation under 26 U.S.C. § 7206(1)¹¹ and therefore, that the trial court erred in not dismissing Counts 5, 6, 7, 10 and 12 of the indictment. Appellant's argument contains erroneous and irrelevant conclusions and is utterly devoid of merit.

Counsel's discussion focuses on the purpose of a 941 Form and the net effect of the false statement in question, rather than its materiality. As such, his position "confuses materiality with the consequences of a falsehood." *United States v. Romanow*, 509 F.2d 26, 28 (1st Cir. 1975). For example, Pappadio suggests that the remedy available to the Government for an employer who falsely

¹¹ 26 U.S.C. § 7206(1) states in pertinent part:

Any person who . . . wilfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony . . .

lists an employee on a 941 Form and then deducts the employee's salary as a business expense is to "pursue the corporation for evading taxes by filing a false corporate return." (Appellant's Brief, p. 16). This assertion is irrelevant to the issue.

The requirements of proof under Sections 7201 (tax evasion) and 7206(1) (false subscribing) are different and evidence of the latter does not necessarily constitute proof of the former. In essence, proof of tax evasion under Section 7201 requires, *inter alia*, that an additional tax be due and owing. Proof of false subscribing under Section 7206(1) must demonstrate, *inter alia*, swearing to a materially false statement regardless of the tax consequences. However, accepting appellant's reasoning, if a false listing of an employee on a 941 Form and the carrying of that falsehood onto the corporate tax return as a salary deduction automatically gives rise to a sustainable charge of corporate evasion of income tax, it would seem that the materiality of the original false statement on the 941 Form is being admitted.

In any event, appellant's reliance on *United States v. Romanow*, 509 F.2d 26 (1st Cir. 1975) is misplaced. *Romanow* makes clear "... that the primary purpose of Section 7206(1) 'is to impose the penalties of perjury upon those who wilfully falsify their returns regardless of the tax consequences of the falsehood' [citations omitted]. . . . Perjury occurs when the false entry is made, even if never relied upon." 509 F.2d at 28. Therefore, appellant's disclaimer of the materiality of a falsification of employees on a 941 Form, which is subscribed under the penalties of perjury, must fail.¹²

¹² The false listing of an employee inherently includes the falsification of the proper or true and correct amount of taxes which must be remitted to the Internal Revenue and also fraudulently accrues Social Security benefits on behalf of the falsely listed employee (T. 297, Gov't. Exhibit 11).

Appellant's additional allegation of error in the trial court's finding of materiality as a matter of law is likewise groundless. See *United States v. Romanow*, *supra*, 509 F.2d at 28. The trial court properly left the fact question of whether DeLorenzo performed any work for MBH and Bidio for the jury's determination and specifically instructed the jury:

As I have said earlier, if you are not satisfied beyond a reasonable doubt from the evidence in this case that DeLorenzo was not performing services for either corporation, then it cannot be found that a materially false return was being filed wilfully by the defendant Pappadio. (T. 1329).

It is therefore respectfully submitted that the instant claim should be rejected.

POINT III

Appellant never moved below for severance of the conspiracy counts and is therefore precluded from raising the issue on appeal.

Pappadio, in a lengthy, although inapposite, argument boldly asserts that the trial court erred in not severing the conspiracy counts.¹³ There is no basis on the record for appellant to make this claim.

During pre-trial motions, counsel specifically moved for severance of only two counts, 14 and 15, which charged Pappadio alone with failure to file the corporate

¹³ Count 1 charged Pappadio and DeLorenzo with conspiracy and Count 2 charged a mirror image conspiracy between Pappadio and Esposito. Although not stated by appellant, it is assumed he also assigns as error the denial to sever all of the Pappadio-DeLorenzo counts from the Pappadio-Esposito counts.

income tax returns of MBH and Bidio. The Government consented to the severance and no other severance motions were made by appellant. Therefore, any challenge of Counts 1 and 2 on appeal for improper joinder under Rule 8(b), Federal Rules of Criminal Procedure, must be rejected as having been waived.¹⁴ See Rule 12(b)(2) and (f), Federal Rules of Criminal Procedure. Nor may appellant belatedly be heard to complain of any alleged undue prejudice under Rule 14, Federal Rules of Criminal Procedure, for again, his failure to move for discretionary severance under Rule 14 by the close of the Government's case precludes such claim on appeal. *United States v. Green*, 561 F.2d 423, 426 (2d Cir. 1977); *United States v. Payden*, 536 F.2d 541, 543 (2d Cir.), *cert. denied*, 429 U.S. 923 (1976); *United States v. West*, 517 F.2d 483 (8th Cir. 1975); *United States v. Porter*, 441 F.2d 1204, 1212 (8th Cir. 1971). See also Rule 12(b)(5), Federal Rules of Criminal Procedure. In any event, appellant does not challenge specific instances in the record as being unduly prejudicial. Rather, he apparently predicates his claim on speculation and conjecture that the

¹⁴ In any event, as Judge Neaher found in his Memorandum and Order of July 2, 1976, deciding the various pre-trial motions: (1) the conspiracy counts had a "sufficient nexus to warrant joinder under Rule 8 Cf. *United States v. Crockett*, 514 F.2d 64, 70 (5th Cir. 1975)" at page 6; (2) the conspiracies were not really "distinct or independent" but were "part of a common scheme or plan, *United States v. Scott*, 413 F.2d 932, 935 (7th Cir. 1969)" at page 6; and (3) therefore, the conspiracies were "sufficiently related to warrant joinder in one indictment. See *United States v. Thomas Apothecary, Inc.*, 266 F. Supp. 890, 892 (S.D.N.Y. 1967)" at page 7.

Judge Neaher also noted with respect to DeLorenzo and Esposito that "even if a severance were granted, the government would still be able to introduce similar act evidence against Pappadio, at either DeLorenzo's or Esposito's separate trial with Pappadio" at page 12, footnote 3. Obviously, as to Pappadio there can be no question that joinder under Rule 8(b) was proper.

jury may have improperly considered evidence offered against Pappadio and Esposito in determining appellant's guilt on the Pappadio-DeLorenzo counts.

Such a claim is frivolous. Even in a severed trial of Pappadio and DeLorenzo, the Pappadio-Esposito evidence would have been admitted, with limiting instructions, against Pappadio as evidence of similar acts. *United States v. Payden, supra*, at 543. Therefore, severance would not afford Pappadio any benefit. Additionally, appellant's assertion that the trial court abused its discretion in refusing to grant a severance is disingenuous, for Pappadio never asked the court below to exercise such discretion.

POINT IV

The Government did not fail to prove an essential element of the charges contained in counts 3 and 4.

Pappadio urges reversal of his conviction on Counts 3 and 4 of the indictment, claiming that the Government failed to prove an "essential element" of the offenses charged, namely venue. This assertion is groundless.¹⁵

Initially, appellant erroneously characterizes venue as an element of the crimes charged. Venue is a procedural safeguard designed to assure the accused of a fair trial in accordance with the Sixth Amendment. Venue does not constitute a substantive element of any federal statutory crime. As the Eighth Circuit explained:

Venue is not an integral part of a criminal offense and . . . need not be proven beyond a reasonable doubt. . . . [I]t must nevertheless be

¹⁵ Again, appellant's version of the facts makes an expanded explanation of the erroneous nature of his assertion necessary.

proved because the accused, under the Sixth Amendment to the Constitution, is guaranteed the right to a public trial by an impartial jury of the state and district wherein the crime shall have been committed. *United States v. Dean*, 246 F.2d 335, 338 (8th Cir. 1957).

In this Circuit, venue has been recognized as a "guaranty of the defendant's right to be tried in the vicinity of his criminal activity, and venue requirements are imposed to prevent the government from choosing a favorable tribunal or one which may be unduly inconvenient for the defendant." *United States v. Rivera*, 388 F.2d 545, 548 (2d Cir.), *cert. denied*, 392 U.S. 937 (1968).

In any event, it is respectfully submitted that this issue is improperly before the Court. There are two occasions when it is proper to move for a dismissal for lack of venue. The first is when the indictment fails to allege proper venue on its face, in which case the objection must be raised before trial or be deemed waived. *United States v. Fabric Garment Co.*, 262 F.2d 631, 641 (2d Cir. 1958); *United States v. Brothman*, 191 F.2d 70, 72 (2d Cir. 1951). The other is when the Government does allege proper venue in the indictment, but fails to sustain the allegation by proof by the close of its case. Under such circumstances it is proper for defense counsel to object at the end of the Government's direct case, since there was no notice of a possible venue defect until that time. *United States v. Bohle*, 445 F.2d 54 (7th Cir. 1971). By citing only *Bohle* in support of his argument, appellant implies that the indictment did, in fact, allege proper venue and that he thus seeks reversal solely on the theory that the Government failed to prove its allegation.

However, such an implication is unfounded and reflects appellant's effort to create the semblance of an appealable issue where, it is submitted, none exists. A

careful reading of Counts 3 and 4 of the indictment indicates that venue was alleged in Andover, Massachusetts. The indictment failed to allege proper venue in the Southern District of New York and was, therefore, defective on its face. As such, this case falls precisely within the rule of *Fabric Garment Co.*, *supra*, and defense counsel's failure to raise a venue objection in a pre-trial motion effectively waived the objection.

Appellant's trial counsel, Mr. Kossman, moved to dismiss Counts 3 and 4 at the close of the Government's case for failure to prove proper venue, which motion the trial court properly denied. There can be no question but that Mr. Kossman was aware of the defect prior to the commencement of the trial. As he stated to the court:

[T]he Grand Jury charged that the crime was committed in Andover, Massachusetts. There is no averment that they prepared or did anything in the Southern District, . . . They said this is a Massachusetts case. *I was waiting and waiting.* I couldn't raise it beforehand. I now raise it on Counts 3 and 4, no venue. Rule 18 provides that it be in the district where the offense was committed as charged in the indictment. (T. 1115) (Emphasis added).

Appellant's reliance on *Bohle* is wholly inapposite. *Bohle* is premised on an absence of notice principle. Mr. Kossman's argument clearly demonstrates his awareness of the defect before the Government commenced its case.

Mr. Kossman cited Rule 18, Federal Rules of Criminal Procedure, in support of his motion but failed to acknowledge Rule 12, which commands that any defense or objection capable of determination without a trial must be raised in a pre-trial motion. Subdivision 12(b)(2) specifically requires that any defect in the indictment

other than lack of jurisdiction or failure to charge an offense must be raised in a *pre-trial* motion. (Emphasis added). Mr. Kossman, in apparent recognition of this waiver, attempted to bring his argument within the *Bohle* exception by construing the absence of a venue allegation as a failure to charge an offense. He argued:

If it is obvious on the [face] of the indictment, that it doesn't state an offense, I could make it even after conviction. However, I make it now. (T. 1116).

Such an argument must, of course, fail. Venue, as already noted above, is never a substantive element of a federal statutory offense. *United States v. Dean, supra*; *United States v. Rivera, supra*. Thus, it appears clear that the venue issue was waived by appellant at the trial level and cannot now be properly resurrected on appeal.

Even if it is assumed, *arguendo*, that the indictment did allege proper venue in the Southern District of New York in Counts 3 and 4, the appeal should be denied. Contrary to appellant's assertion that no venue was proved "in either the Southern District of New York (where the case originated) or the Eastern District of New York (where the case was subsequently transferred)" (Appellant's Brief, p. 27), the Government did establish venue in both districts.

The Government need only prove venue by a preponderance of the evidence. *United States v. Panebianco*, 543 F.2d 447, 455 (2d Cir. 1976). Allegations of preparing, signing, or making a false or fraudulent tax return, or the causing of same, have been held sufficient to support venue in the district in which committed. *United States v. Slutsky*, 487 F.2d 832, 838 (2d Cir. 1973), *cert. denied*, 416 U.S. 937, *reh. den.*, 416 U.S. 1000 (1974); *United States v. Albanese*, 117 F. Supp. 736 (S.D.N.Y., 1954), *aff'd*, 224 F.2d 879 (2d Cir.), *cert. denied*, 350 U.S. 845 (1955).

In the instant case, Mrs. Helen Miller, the bookkeeper for MBH and Bidio, testified that she maintained the books for both firms including the general ledger, the accounts and disbursements journals, and payroll records at the offices of MBH and Bidio. She further testified that DeLorenzo was entered on the payroll records at Pappadio's instructions (T. 97-99, 109).

Myron Raisman, the corporation's accountant, testified that he went to 325 West 37th Street, New York, New York (the address of MBH and Bidio) to gather the information necessary to prepare the corporate tax returns (Form 1120) and utilized these books in the preparation of the returns (T. 267-68, 353). Raisman also testified that the final preparation of each of the corporate tax returns in question was performed at his office, which, as reflected on the returns themselves, was on Long Island (T. 247, Gov't. Exhibits 19 and 20).

Therefore, it is submitted that venue was sufficiently established. See *United States v. Slutsky, supra*. It is ironic, however, that Pappadio alleges a defect in venue when venue was transferred to the Eastern District of New York upon his motion pursuant to 18 U.S.C. § 3237 and the record makes obvious that he received both the procedural and constitutional venue safeguards intended under Rule 18 and the Sixth Amendment.

POINT V

The evidence was more than sufficient to support appellant's conviction.

Appellant suggests there was insufficient evidence below to support his conviction. This claim is specious.

At the outset, it must be noted that appellant's argument is conspicuously silent with respect to Judge Neaheer's denial of his and DeLorenzo's Rule 29 Motions

(T. 1123 and 1133).¹⁶ However, this omission does not alter the fact that, at least in the trial court's view, the evidence against Pappadio and DeLorenzo was sufficient to send the case to the jury and was not based merely on "theory", as appellant suggests (Appellant's Brief, p. 31).

In summary fashion, the evidence below, albeit proof of a negative, established that DeLorenzo performed no work for appellant's companies, MBH or Bidio. Nevertheless, Helen Miller, the bookkeeper, placed DeLorenzo's name on the payroll records of MBH and Bidio at Pappadio's instruction and therefore included him as an employee on the 941 Forms and W-2 Forms which DeLorenzo submitted with his personal income tax returns (Form 1040) (T. 89-90, 97-9, 106-09). Although she had seen DeLorenzo at the office of MBH and Bidio speaking with Pappadio, she had no idea what, if any, services DeLorenzo performed for the companies (T. 149). Further, Miller always gave the DeLorenzo payroll checks to Pappadio who, on 36 occasions during 1969 and 1970, returned the checks to Miller for cashing. Miller never witnessed DeLorenzo endorse a check, always returned the cash to Pappadio, and was never asked by DeLorenzo for his checks or the cash proceeds thereof. (T. 110-14).

Nat Sacco, the foreman of MBH and Bidio and brother-in-law of appellant, was introduced to DeLorenzo by Pappadio as a salesman, but had no idea what, if any, services DeLorenzo performed and had no dealings with him (T. 484-89, 495, 497, 504-5).

¹⁶ This fact takes on additional significance since Judge Neaheer granted a like motion made on Esposito's behalf and since appellant seeks to bolster his argument by quoting portions of the Judge's comments relating to Esposito. However, Judge Neaheer distinguished the evidence against DeLorenzo and Pappadio as being sufficient on numerous occasions (T. 1006, 1009, 1016, 1018-19, 1027, 1046).

Irwin Bishins, the fifty percent partner of Pappadio in MBH and Bidio, indicated that sales was Pappadio's sole responsibility as far as he knew (T. 357-60). Bishins explained that many of the companies which utilized the cutting services of MBH and Bidio were owned by himself and Pappadio and as such they did not need a salesman to do business with themselves (T. 360-63). Bishins did not know that DeLorenzo was on the payroll of MBH and Bidio (T. 363-67); after appearing before a federal grand jury, he asked Pappadio about DeLorenzo and was told by appellant: "[L]ook, you handle your production and I'll worry about Bidio and MBH" (T. 378, 442-44).

The testimony and stipulations of the dress manufacturer customers who dealt with MBH and Bidio established that none of them ever dealt with or heard of Matteo DeLorenzo, that they dealt with Pappadio or Sacco and in the main had been dealing with Pappadio for years prior to DeLorenzo's purported employment. Certain of these companies also listed Pappadio as an employee, further establishing the direct business relationship between Pappadio and the manufacturer (T. 449, 462, 513, 537, 550, 573, 637, 678, 767, 769).

In addition to the above testimony, a stipulation of fact was entered into that none of the alleged payroll checks of DeLorenzo for 1969 or 1970 were endorsed by him and that in 1971, only 21 checks were endorsed by DeLorenzo. In sum, 21 of 152 of DeLorenzo's payroll checks were actually endorsed by him from 1969 through 1971 (Gov't. Exhibits 14, 15, 16, 24).

Further, Mario Suriano, a nephew by marriage of appellant, testified that in 1969, Pappadio gave him a twenty-five thousand dollar (\$25,000) loan consisting of cash and checks made out by Pappadio on corporations which he owned, in the names of other individuals. Seven of these checks—over a four month period—were MBH checks made out to Matteo DeLorenzo. As noted, none of

these checks were endorsed by DeLorenzo, although six had DeLorenzo's name endorsed by someone else (T. 687-95).

Finally, of course, the accountant for MBH and Bidio established that the corporate records reflecting DeLorenzo as an employee were utilized in the preparation of the tax returns for the years in question, which resulted in, *inter alia*, a reduction in the corporate taxes paid by MBH and Bidio for those years (T. 230-48).

The jury, by its verdict, obviously found: (1) that DeLorenzo performed no services for MBH or Bidio; and (2) therefore that Pappadio attempted to evade corporate taxes by causing the deduction of moneys purportedly paid to DeLorenzo as salary on the corporate tax returns in question; (3) that Pappadio subscribed to false Employer's Quarterly Federal Tax Returns (Form 941); (4) that he aided and abetted DeLorenzo in subscribing a false personal income tax return (Form 1040) by causing the creation of a false W-2 Form to be issued to DeLorenzo; and (5) that he conspired with DeLorenzo to commit the above offenses.

Accordingly, based on the facts presented, it is clear that there was ample evidence to support the verdict. See *United States v. Ragen*, 314 U.S. 513, 525-26 (1942); *United States v. DiVarco*, 343 F. Supp. 101, 103 (N.D. Ill., E.D. 1972), *aff'd.*, 484 F.2d 670 (7th Cir. 1973); *cert. denied*, 415 U.S. 916 (1974); *United States v. Knox Coal Company*, 347 F.2d 33 (3rd Cir. 1965); *United States v. Lange*, 161 F.2d 699 (7th Cir. 1947).

CONCLUSION

For the above stated reasons, the judgment of conviction should be affirmed.

Dated: Brooklyn, New York
February 16, 1978

Respectfully submitted,

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*The United States Attorney's Office wishes to acknowledge the assistance of Jeremy Smith, a second year law student at Brooklyn Law School, in the preparation of this brief.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Gavin Scotti being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 21st day of February 1978 he served a copy of the within Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Saxe, Bacon & Bolan P.C.

39 East 68th Street

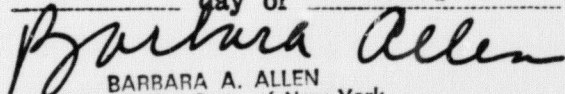
New York, New York 10021

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.



Sworn to before me this

21st day of February 1978



BARBARA A. ALLEN
Notary Public, State of New York
No. 24-6646824
Qualified in Kings County
Commission Expires March 30, 1979